United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF FOR REHEARING EN BANC

75-7608

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P/S

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7608

IRVING SANDERS, *Plaintiff-Appellee,*

—against—

LEON LEVY, *et al., Defendants-Appellants.*

EGON TAUSSIG, *Plaintiff-Appellee,*

—against—

SIDNEY M. ROBBINS, *et al., Defendants-Appellants.*

MICHAEL SHAEV and RITA SHAEV, *Plaintiffs-Appellees,*

—against—

ERIC HAUSER, *et al., Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF DEFENDANTS-APPELLANTS OPPENHEIMER MANAGEMENT CORP., OPPENHEIMER & CO., LEON LEVY AND JACK NASH ON REHEARING EN BANC

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POINT I

PLAINTIFFS-APPELLEES HAVE FAILED TO ESTABLISH THAT THE COST OF IDENTIFYING CLASS MEMBERS MAY BE CHARGED TO ANYONE OTHER THAN PLAINTIFFS

A. Plaintiffs Must Bear The Cost of Identification Of Class Members As An Inherent Part Of The Notice Procedure.

Plaintiffs do not cite any decision since "Eisen IV", Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), which holds that the cost of notice, in whole or in part, is to be borne by defendants in a class action. Nor do plaintiffs refer to any authority establishing that the cost of identifying class members is not an integral part of the cost of notice. Despite the Supreme Court's ruling in Eisen IV and subsequent lower court decisions, plaintiffs still contend that defendants are and should be required to bear what here amounts to more than 75% of the aggregate cost of notice to class members. Their contentions should be rejected, since, as set forth in the Main Brief on Rehearing of Oppenheimer Defendants at 25-29,* the cost of identifying members of the class must be borne by the plaintiffs, as a matter of law.

Plaintiffs attempt, without success, to distinguish a few of the cases cited by defendants on this point. (Pltf. Br. at 28-29)** Thus, for example, plaintiffs cite with approval the

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* Reference is to Brief of Defendants-Appellants Oppenheimer Management Corp., Oppenheimer & Co., Leon Levy and Jack Nash.

** Brief of Plaintiffs-Appellees will be so referred to.

allocation of identification costs to defendants in Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969), but that is now clearly improper and irrelevant to this appeal, in view of the intervening decisions in Eisen IV and "Eisen III", Eisen v. Carlisle & Jacquelin, 479 F. 2d 1005 (2d Cir. 1973). However, the determination of the Court in Berland that class identification is part of class notification under Rule 23 remains sound authority.

In B & B Investment Club v. Kleinert's Inc., CCH Fed. Sec. L. Rep ¶94,451 at pp. 95, 571-73 (E.D. Pa. 1974), the Court did not remotely suggest, by reference to Berland v. Mack or otherwise, that the cost of class identification should be borne by defendants, as plaintiffs indicate (Pltf. Br. at 29.) In fact, the Court there ordered "plaintiffs to present the Court with their proposal on how to identify the class members and the cost involved in notice and their ability and willingness to meet those requirements."

Plaintiff would distinguish State of Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484 (N.D. Ill. 1969), on the ground that the plaintiffs there had in their possession the raw data from which to identify class members. (Pltf. Br. at 29-30.) But possession of the raw data is not relevant, since in the instant case defendants have in effect granted plaintiffs access to the raw data - i.e., the computer tapes containing the names and addresses of the members of plaintiffs' class. What is significant is that plaintiffs in State of Illinois were required to bear

whatever costs were involved in obtaining names and addresses from such raw data, as they should here.

Plaintiffs similarly seek to distinguish Herbst v. International Telephone & Telegraph Corporation, District Court Opinion reprinted in Appendix, 495 F. 2d 1308, 1325 (2d Cir. 1974), on the grounds that defendants were required to provide plaintiffs with raw data in their possession - i.e., unrefined "listings or materials in their possession useful for the notification of class members." The decision there should obtain here: Plaintiffs, not defendants, were compelled to bear the cost of perfecting the identification of class members from the raw materials.

Based on the relevant decisions since Eisen IV, as set forth in our Main Brief at pp. 23-29, the majority opinion of the Circuit Court decision herein correctly concluded that the District Court erred in directing the Fund to bear so much of the cost of notice as relates to identifying class members.

B. The Discovery Rules Are Not Applicable To Identification Of Class Members For Notice Purposes.

As set forth in our Main Brief (pp. 29-33), the scope of discovery is limited to matters relevant to the subject matter in the action or which is reasonably calculated to lead to the discovery of admissible evidence, and information as to the names and addresses of class members for the purpose of sending them a class action notice does not bear on the substantive issues of the

litigation but is entirely collateral thereto.

Plaintiffs argue strenuously and at considerable length that the discovery rules do apply (Pltf. Br. at 20-39). However, plaintiffs do not cite a single decision that holds that the federal discovery rules may be used to ascertain the identities of putative class members for the purpose of individually notifying such members of the actions's pendency as required by Rule 23(c)(2).

The cases which plaintiffs do cite (Pltf. Br. at 22-26) do concern discovery in connection with class certification but not for purposes of notice. Those cases are entirely consonant with the governing precept that discovery is limited to matters relevant to the subject matter involved in the pending action. Discovery was limited in each case to matters relating to pleading allegations necessary to warrant maintaining the action as a class action, which usually involved issues of numerousness of class members and commonality of questions of law or fact. See, Dickerson v. United States Steel Corp., 18 F.R. Serv. 2d 554 (E.D. Pa. 1974); Wolfson v. Solomon, 54 F.R.D. 584, 591 (S.D.N.Y. 1972); Branch v. Reynolds Metals Co., 17 F.R. Serv. 494 (E.D. Va. 1972); Burnstein v. Slote, 12 F.R. Serv. 2d 577 (S.D.N.Y. 1968).*

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* In Burnstein v. Slote, supra, the issue was plaintiffs' right to depose defendants with respect to the issue of numerousness prior to the court's consideration of the issue of class certification. The question whether discovery is a permissible means of identifying the members of the class was not then before the court. The comments of the court in this connection are dicta, unsupported by any citation of authority and, in any case, erroneous.

In none of these cases, were defendants compelled to identify class members for the purpose of Rule 23(c)(2) notification.

Plaintiffs also cite Appleton Electric Co. v. Advance-United Expressways, 494 F. 2d 126 (7th Cir. 1974). The facts there are so unique as to make it inapplicable to the usual situation of the type here involved. A recognition of the singular nature of the Appleton suit pervades the opinion of that court. Id. at 134-39. Appleton was a proceeding to enforce the payment of money refunds under an Interstate Commerce Commission order. The order had been previously challenged by defendants and upheld by a three-judge court and by the United States Supreme Court. Thus, at the time of the Appleton suit, the defendants' liability to the individual members of the would-be class had already been established, and the sole issue before the court was whether a class action was an appropriate mechanism to obtain the required refunds. This fact alone greatly distinguishes Appleton from Eisen III, Eisen IV and the instant case. However, in ordering defendants to assist in the identification of class members, the Appleton court enumerated other substantial distinctions, including defendants' attempt to destroy records that would enable class members to be identified, and, indeed, indicated that, because the suit was brought to compel a refund, it was suited to exception suggested by this Court in Eisen III, 479 F. 2d 1005, 1009, fn. 5 (2d Cir. 1973).

Like jurisdiction, allegations such as numerousness and commonality of questions are essential elements that must be pleaded and proven if the action is to be maintained as a class action. Accordingly, such information falls well within the scope of discovery under Rule 26(b)(1) which is limited to matters "relevant to the subject matter involved in the pending action" or information leading to such matters. This is not the case here. The identification of class members herein has no relevance to any material allegations of the complaint. For these reasons, the distinction between discovery of numerosity and of names is neither arbitrary nor illogical as plaintiffs contend. Any other view is contrary to the limits placed on discovery by FRCP Rule 26(b) and would contravene the Supreme Court injunction that "the plaintiff must [bear] the ordinary burden of financing his own lawsuit." Eisen IV, 417 U.S. 156, 179 (1974).

Plaintiffs note that in this case they were permitted by the District Court without objection of the defendants to interrogate the transfer agent concerning the problems involved in identifying class members and the methods and costs of sending notice to the class (Pltf. Br. at 26). From this, the plaintiffs erroneously conclude that anything and everything is permissible under the discovery rules. The conclusion is a non-sequitor.

First, it should be pointed out that plaintiffs' interrogation of the transfer agent as to class action matters was limited to the matters summarized above. At no time during that interrogation

nor at any time thereafter have plaintiffs attempted to obtain the actual names and addresses of class members.

Second, we respectfully submit that authority to obtain such information does not arise under the discovery rules but under the inherent power conferred on the Court to enable it to determine whether individual notice is to be sent to all class members "who can be identified through reasonable effort" as required by FRCP Rule 23(c)(2). Such power is inherent in the obligation imposed on the Court. The existence of such inherent power is not novel.

Thus, in Ex Parte Peterson, 253 U.S. 300, at 312 (1920) the Supreme Court sustained the appointment of an auditor by the district court where there was no express authority for such appointment, saying:

> "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments for the performance of their duties.

Similarly, in Ex Parte United States, 101 F.2d 870, at 878 (7th Cir. 1939), aff'd 308 U.S. 519 (1939) in connection with the authority of a district court in a criminal proceeding to enter an order of dismissal notwithstanding a jury verdict, the Circuit Court declared:

> "In the absence of prohibitive legislation courts have an inherent power to provide themselves with appropriate procedures required for the performance of their tasks."

See also Matter of Carla L., 77 Misc. 2d 363, at 368, 353 N.Y.S. 2d 317, 325 (Family Court, N.Y. County, 1974), modified in other respects 45 App. Div. 2d 375 (1st Dept. 1974), and cases cited in the Family Court decision. Even the power to punish for contempt has been considered to be derived from the necessity to enable courts to perform their obligations. See Gompers v. Bucks Store & Range Co., 221 U.S. 418, 450 (1911).

In view of the foregoing, we do not believe there is any sound basis for holding that identification of class members for notice purposes falls within the scope of discovery.

C. Even If Discovery Rules Were Applicable, The District Court Was Without Discretion To Impose The Cost Of Identifying Class Members On The Defendant Fund.

The cases and authorities cited by Plaintiffs (Pltf. Br. at 31-34) to the effect that the district court generally has wide discretion in matters of discovery are inapposite in the factual context of the instant action. Their contentions can only be made in disregard of Rule 33(c), the language of which is not permissive but rather mandatory.*

Under this Rule, the defendants are granted the right to avoid doing plaintiffs' work if they afford plaintiffs a reasonable opportunity to abstract the identities of the class members from the computer tapes in the possession of the Fund's transfer agent. The defendants have afforded plaintiffs this opportunity and the transfer agent is willing to do the necessary work if paid for. However, consistent with Rule 33(c), the District Court does not have the

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* Rule 33(c) of the Federal Rules of Civil Procedure states:
"(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries."
(emphasis supplied)

discretionary power to compel defendants to assume the additional burden of paying for the cost of the work.

The cases cited by plaintiff in support of a contrary conclusion (Pltf. Br. at 32) were all decided prior to the adoption of Rule 33(c) and are contrary to the more soundly reasoned views cited in our brief (p. 35) which ultimately were adopted into Rule 33(c).

To the extent that plaintiffs' cases retain any value, they support defendants' position and the prevailing rule, that the costs of refining and analyzing raw materials are to be borne by the interrogating party. Thus, in United States v. Nysco Laboratories, Inc., 26 F.R.D. 159, 162-63 (E.D.N.Y. 1960), the court did not require the defendants to analyze and summarize the written opinions of defendants' expert witnesses, as requested by plaintiff. Instead, the court merely directed defendants to furnish plaintiff "a description of the tests sufficient for identification ..." Similarly, in Caldwell-Clements v. McGraw-Hill Publishing Co., 12 F.R. D. 531, 538 (S.D.N.Y. 1952), in order to answer plaintiff's interrogatories defendant would have been required to make extensive compilations and summaries. Although rejecting defendant's objections grounded upon the relevance of the information sought, the court stated (12 F.R.D. at 538):

> "This is not to say that defendant may not further reduce its task by supplying plaintiff appropriate documents containing the information sought in reasonably manageable form in lieu of answers."

American Oil Co. v. Pennsylvania Petroleum Products Co., 23 F.R.D. 680, 683 (D.R.I. 1959), is not relevant to the facts attending the instant matter. Unlike the identification of class members herein, the court there found that the information sought would "undoubtedly be assembled" by the defendant prior to trial in preparation of its defense and so was not objectionable as burdensome.

Nor do the commentators cited by plaintiffs support their contentions. Plaintiffs' quotation of 8 Wright & Miller, Federal Practice and Procedure § 2218 at p. 659 (1971), is taken from a discussion of Rule 34, which governs the production and inspection of documents and things. In the case of computerized information, Professors Wright and Miller note that the document will usually be a printout, the principal form of expressing computer data, and, absent undue burden, the responding party may be required to pay the cost of making a printout of existing computer data in such party's possession. This is generally a nominal expense. However, as a majority of the Circuit Court recognized (Slip Op. at 4588, fn. 7), the identities of the class members herein are not existing data subject to Rule 34. Plaintiffs seek to compel the defendant Fund to pay to create and implement original programs to scan the records and obtain the necessary information. As to situations of this sort, Professors Wright and Miller caution: "the courts

will have to become increasingly sensitive to problems of expense and the utilization of an opponent's computer assets." Id. at 659. Thus, in commenting on Rule 33(c), Wright and Miller, in consonance with the prevailing view, state: "If the data is equally available to both parties, the party seeking the information should do his own search." Id.at § 2174, pp. 552-53 (emphasis supplied); accord, 4A Moore's Federal Practice ¶33.20 at pp. 33-103 (2d ed. 1975).*

Accordingly, even if discovery rules are here applicable, which defendants deny, the District Court was not authorized to impose notice or identification costs on defendants under the alleged authority of such rules.

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* Plaintiffs make much of the concern expressed in Judge Hays' dissent that computer technology might be used as a shield to "immunize business activity from later scrutiny." We submit that, where there is evidence of such intentional misconduct, the courts do not lack power to take corrective action. See, Appleton Electric Co. v. Advance-United Expressways, supra. There is no indication of obstruction in this case. Moreover, it is an illusory concern here, since many of the class members can be identified from printed matter in the possession of the transfer agent (A-204-5). Plaintiffs have not requested this material presumably because the cost of manually culling the names and addresses of members of class would be equal to or greater than the cost of a computer search. Thus, the expense of identification is largely attributable to the peculiarities of the class composition and not the storage of such information on computer tapes.

POINT II

THE RELATIONSHIP BETWEEN PLAINTIFFS AND DEFENDANTS HEREIN DOES NOT WARRANT ANY DEPARTURE FROM THE NOTICE COST RULE ESTABLISHED IN EISEN IV

Seeking to avoid application of the notice-cost rule established in Eisen IV, plaintiffs, quoting Judge Hays dissenting opinion with approval (Pltf. Br. p. 47), in effect contend that a district court may grant an exception to that rule wherever a fiduciary relationship exists between class action defendants and plaintiffs. We believe that plaintiffs' contention is without merit for the reasons set forth below and in our brief on this rehearing (at pp. 39-45).

1. Neither Eisen IV nor Dolgow v. Anderson, 43 F.R.D. 472, 498-500 (E.D.N.Y. 1968), which are the only authorities cited by plaintiffs, support their position. The Supreme Court did not authorize any exceptions to the usual rule, but merely raised the possibility that there might be an exception where a fiduciary duty pre-existed, citing Dolgow as an example, but then noting that where the relationship was truly adversarial plaintiffs must pay the cost of notice. Eisen IV, 417 U.S. at 178-9. Although the views expressed by the Supreme Court are not free of ambiguity, one reasonable reading is suggested by the majority decision herein that plaintiffs must bear notice costs"where the relationship between the parties is truly adversary" even if there is also a fiduciary relationship (Slip Op. pp. 4582-83). On that reading,

plaintiffs must bear all costs since plaintiffs urge that the relationship of all parties, including the Fund, is truly adversary. (See Pltf. Brief on rehearing, at 46.)

2. The Dolgow decision rested on the conjunction of three factors: a prima facie showing, after a mini-hearing on the merits, that there was a breach of fiduciary obligations between the parties; the defendants' interest in res judicata effects; and the defendants' ability to bear the expense of notice. Since Eisen III and Eisen IV, two of these three factors must be eliminated from consideration. Mini-hearings are not authorized and therefore there is no prima facie showing of breach of obligations; and, the ability to pay is irrelevant.

3. Plaintiffs claim (Brief on rehearing, p. 41) that Dolgow and the instant case are analogous is devoid of merit. Plaintiffs' claim is predicated on the fact that both are class actions, in which plaintiffs were purchasers of securities and that defendants in both cases "were in essentially the same position." But, in fact, the defendants are not in the same position, and the difference is critical. In Dolgow, the defendants were corporate insiders with material undisclosed inside information, selling their own holdings to plaintiffs and seeking to profit personally from such sales, all in violation of the federal securities acts, and all of this was established at the mini-hearing. In the instant case, no prima facie breach of

duties - whether fiduciary or contractual - has been established; the stock purchased was not from insiders but from the Fund; the price paid was not intended to enrich the defendants but went to the Fund for its portfolio investments in which all shareholders had their pro rata interest; and what this case involves is at best not a breach of fiduciary obligation but a question of judgment as to the valuation within a narrow compass of a relatively small segment of the Fund's portfolio (See our brief on rehearing at p. 41).*

4. The remote connection between the fiduciary relationship of the parties and the alleged wrongdoing in this case points up the difficulties envisioned by Judge Canella in Popkin v. Wheelabrator-Frye, Inc., CCH Sec. L. Rep. ¶95,068 at pp. 97747-8 (S.D.N.Y. 1975) (cited in extenso in our brief at pp. 42-3) - namely, that an exception where there are fiduciary relationships would be highly inequitable because it would not take into account the strength or weakness of the case, the nature of the class, and the real possibility that substantial costs so advanced might

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* The damages of $1,500,000 claimed by plaintiffs is only approximately 3/10 of 1% of the Fund's net asset value of $500,000,000.

never be recovered even if defendants prevailed.*

5. Even if the Supreme Court intended that an exception from the usual cost rule might be made where a fiduciary relationship pre-existed between truly adversary parties, no such exception is warranted here. As set forth in our main brief, this is not a case which confers any benefits on the Fund or the other defendants. Nor is it the kind of case which is analogous to the situation in Dolgow, where fiduciaries were seeking improperly to enrich themselves at the expense of class members (see ¶4 above).** As the majority opinion herein properly concluded: "Assuming that there may be cases where the imposition of notification costs on the defendant may be justified, we do not think this is such a case." (Slip Op. at 4582).

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* Plaintiffs' brief submitted to the Panel of this Court (at 59) urged that, in the event that the defendants are compelled to pay the costs of class identification, such costs would not be taxable against the plaintiffs should the defendants ultimately prevail on merits in this action.

Apparently recognizing the injustice of this position and in an effort to avoid the requirement of a bond for such costs as recommended by the American College of Trial Lawyers, plaintiffs now state (Pltf. Br. at 36): "[I]f the defendants prevail in this action, [the Fund] may seek to have these expenses taxed against the plaintiffs pursuant to Rule 54(d) of the federal rules."

** While the defendant Management Company's fee was based in part on net asset value of the Fund, during the years in question it also received a performance fee. Thus, an overstatement of fund assets might increase one aspect of the fee but this would result in a higher base and consequent lower performance fee.

6. Should this Court adopt the "exception" advocated by plaintiffs, the "usual rule" for payment of notice costs in Rule 23(b)(3) class actions as laid down by the Supreme Court will be completely undermined and the exception will become the rule. A majority of all Rule 23(b)(3) class actions involve fiduciary relations, including, among others, those arising out of the relationship between shareholders on the one hand and, on the other, issuers, officers or directors. Indeed, during the three-year period 1972-1975 (i.e., from two years prior to the Eisen IV decision to one year thereafter) a fiduciary duty pre-existed between plaintiffs and defendants in more than 60% of all reported district court cases in which class action status was granted under Rule 23(b)(3).*

We do not believe that the brief ambiguous comment in Eisen IV was intended to be construed in a manner which would turn the "usual rule" on its head.

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* The percentage is based upon our analysis of Rule 23(b)(3) cases, which among others, are collected in J.T. McLaughlin, Federal Class Action Digests - 1976 (Practising Law Institute, 1976).

Accordingly, even if it be assumed that the Supreme Court in Eisen IV suggested that there might be an exception to the notice cost rule, it is clear that any such exception has no proper application to this case and plaintiffs herein must bear all notice costs consistent with the usual rule.

POINT III

DEFENDANTS ARE NOT RESPONSIBLE FOR CAUSING IDENTIFICATION COSTS TO BE INCURRED

The majority of the panel (Slip Op. at 4585-87) properly rejected as factually and legally erroneous plaintiffs' twin assertions: (1) that defendants' opposition to the redefinition of the class proposed by plaintiffs resulted in additional expense of class member identification; and (2) that, for this reason, the district court below had discretion to allocate to defendants all of the identification costs.

In their complaints (A-116-19), plaintiffs sought to represent all past and present shareholders of the Fund who acquired their shares during the relevant period. After plaintiffs' motion for class certification had been filed, it was discovered that a cost of approximately $16,500 would be incurred in the identification of class members. Seeking to avoid these costs, plaintiffs applied to the district court for permission: (1) to redefine the class so as to exclude all purchasers who were not current shareholders; and (2) to send a blanket notice of the pendency of the action to all current shareholders whether or not they were class members. As indicated in our Main Brief on Rehearing at 46,* the iden-

*See also Main Brief on Rehearing of Defendants Delaney and Celler at 19-20.

tification costs would have been obviated only if the court below would have adopted both of plaintiffs' proposals for the limited class and for the blanket notice.

The defendants opposed plaintiffs' proposed redefinition as part of their opposition to a broadside mailing to all Fund shareholders, which, there was evidence to show, might result in a flood of shareholder redemptions with consequent injury to the Fund and its remaining shareholders. Both the Circuit Court majority opinion (Slip Op. at 4586-87) and the district court concluded upon the evidence that there was a substantial risk of harm to the Fund from a broadside mailing to the numerous current Fund shareholders who were not class members.* As pointed out in our Main Brief (at p.48) courts have been sensitive to the possible adverse consequences of a class notice.

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* Counsel for plaintiffs (Pltfs. Br. at 54 fn.) urge that the district court below "did not decide ... that the method of giving notice proposed by the plaintiffs was improper or that the defendants' claims of harm resulting from giving notice in this matter were in any sense well-founded."

The short answer to plaintiffs' unfounded assertion is that the district court's order expressly provides that the class notice may be sent only to class members (A-189-90). Moreover, in a number of conferences with all counsel prior to a decision on the class motion, the district court (Griesa, J.) repeatedly said he would reject plaintiffs' proposal for a broadside mailing because of the risk of damage to the Fund.

Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971), which plaintiffs cite (Br. fn. at 54) does not hold to the contrary. That case did not involve an open-end mutual fund, as does the instant case, where stockholders may redeem at any time. Accordingly, the risk of harm to the corporation and its stockholders was virtually absent, especially as the company there had previously called the stockholders' attention to the litigation by a separately printed document - namely, a letter from the president.

However, the district court's decision did not turn on the impropriety of a mailing to all current shareholders, since the court denied the redefinition posed by plaintiffs because it "would involve an arbitrary reduction in the class." (A-175) Thus, as the panel correctly concluded it would be illogical to assert that defendants' interests played any part in the determination that the proper class was as originally defined.

Plaintiffs claim that under Eisen III, 479 F.2d 1009, fn.5 (2d Cir. 1973), district courts may engage in a balancing act so as to reach "a fair overall disposition" through exercise of discretion in allocating the costs of notice according to the particular facts and circumstances of each case (Pltf. Br. at 49-50). Plaintiffs further claim that the

court below in the exercise of such discretion elected to impose the costs of identification on the Fund rather than adopt plaintiffs' requests for redefinition and a general mailing, which, plaintiffs maintain, were also within the district court's discretion.

It is respectfully submitted that the governing rule on the allocation of notice costs is set out in the opinion of the Supreme Court in Eisen IV. That Court did not remotely suggest that district courts were to engage in any such balancing act or be accorded discretion to impose notice costs on defendants depending upon the facts of each case. Nor does the decision of this Court in Eisen III support such a construction. Obviously, should notice costs be allocated according to the varying combinations of factual factors of each case, there can be no "usual" notice cost rule as contemplated in the Eisen decisions.

Further, where a class of shareholders can be identified, a general mailing of notice to a substantial number of shareholders who are not members of the class would be inconsistent with the express requirements of Rule 23(c)(2). That Rule specifies that the "best notice practicable," including individual notice, shall be directed to "all members who can be identified through

reasonable effort." Plaintiffs have failed to distinguish any of the cases cited in our Main Brief on Rehearing at 48-50 which denied blanket mailings of notice to nonclass member shareholders where identification of the class was possible. Nor do plaintiffs refer this court to any authorities supporting the method of notice advanced by them.

Plaintiffs appear to rely chiefly upon Berland v. Mack, 48 F.R.D. 121, 126 (S.D.N.Y. 1969), in support of their assertion that notice may properly be sent to nonclass members as well as class members. The Berland court did not so hold. There, the class was composed of persons who acquired shares of defendant corporation between March 21, 1966 and April 29, 1966. On April 29, 1966, trading in the stock was suspended by the SEC for a six-month period. In order to cover purchasers at the end of the period where there had been delays in transfer, the court ordered individual notice by mail to all transferees of record for the period from March 21, 1966 to May 13, 1966. Because of the suspension of trading, shareholders who were not class members did not receive notice of the action. In fact, the opinion clearly evinces the Court's concern that notice of the action be sent only to class members.

Nor do the other cases cited by plaintiffs support

their contention that where the members of a class can be identified, notice may be directed to nonclass as well as class members. (Pltf. Br. at 51-54). Eisen III and Eisen IV do not intimate that this suggested procedure would be satisfactory. Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 (1950), merely recognizes the insufficiency of notice by publication of a trust accounting where the names and addresses of the beneficiaries are known to the trustee, and, so, is inapposite here. In Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971), there is no indication that notice was sent to shareholders of the defendant who were not also class members. Thus, the case is not pertinent to the question of harm present herein, resulting from receipt of Rule 23 notice by a substantial number of shareholders who are not members of the class. Similarly, plaintiffs cite Zachary v. Chase Manhattan Bank, 52 F.R.D. 532 (S.D.N.Y. 1971) (class composed of credit card holders and not shareholders); Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968) (court did not authorize use of corporate mailing); Popkin v. Wheelabrator-Frye, Inc., CCH Fed. Sec. L. Rep. ¶95,068 (S.D.N.Y. 1975). In none of these cases did the Court authorize use of a regular corporate mailing to disseminate notice of the class action to a substantial body of stock-

holders who were not class members.*

Plaintiffs' reliance upon In re Antibiotic Antitrust Actions, 333 F.Supp. 291 (S.D.N.Y. 1971), is misplaced. In the Antibiotic actions the class consisted of all persons who purchased antibiotic drugs from hospitals and retail outlets within the state during a twelve-year period. Thus, unlike the instant case, the class members could not be identified, and therefore the trial court was authorized to devise an alternative manner of communicating notice. The Court there directed notice by mail to certain residents of the state who had been selected at random from mailing lists in plaintiffs' possession, and apparently at plaintiffs' expense. However, again in contrast to the instant case, this method of notice did not present either a substantial or an avoidable risk of prejudice to the Antibiotic defendants. Unlike shareholders of a mutual fund, consumers of antibiotic drugs constitute a captive market, and there was little possibility that non-class members who received notice of the Antibiotic actions would be dissuaded

* Pltf. Br. at 52, fn. cites Justice Douglas' dissenting and concurring opinion in Eisen IV, fn. 1 at p. 180, on this point. Aside from the fact that his views did not prevail, the footnote is obscure, and in any case did not involve a corporate mailing to stockholders with the attendant risk of injury to the company.

from future purchases.

Fisher v. Kletz, 41 F.R.D. 377, 384-86 (S.D.N.Y. 1966), cited in Pltf. Br., fn. at 52, in fact held that in view of pending discovery proceedings and other pretrial matters, notification of the class was premature, without addressing the question whether Rule 23(c)(2) requires identification of class members prior to sending notice.

We submit that: (1) the decisions in Eisen IV and Eisen III preclude the exercise of discretion by the district courts in allocating notice costs according to the peculiar facts of each Rule 23(b)(3) case; (2) the defendants, through opposition to plaintiffs' proposed redefinition of the class or otherwise, did not increase the costs of class identification; and (3) the indiscriminate method of notice posed by plaintiffs, with its attendant prejudicial impact on the Fund and its current shareholders, is contrary to the express language of Rule 23(c)(2) and prevailing case law.

Accordingly, there is no legal, equitable or factual basis for imposing any of the costs of class notification, including the cost of class identification, on defendants.

POINT IV

THIS ACTION SHOULD NOT BE PERMITTED TO BE MAINTAINED AS A CLASS ACTION

In Point II of our Main Brief at pp. 51-58, we have summarized our contentions as to why the District Court erred in finding that this action may be maintained as a class action despite the fact that common questions of law and fact did not predominate and despite the severe difficulties likely to be encountered in the management of the action where only very modest recoveries on average would be realized even if plaintiffs prevailed.

Plaintiffs have not briefed this point, contending that the question of class determination is not before this Court on this rehearing en banc (Pltf. Br., 2d fn. at p. 3). While plaintiffs are understandably not interested in having this Court review an issue on which they prevailed before the Circuit Court, we know of no reason why the issue is not now reviewable. The order of the Chief Judge granting the petition for rehearing in no way limits the matters to be reviewed. On the contrary, that order provides for a reconsideration of the entire matter, in terms as follows:

> "A petition for rehearing containing a suggestion that the action be reheard en banc having been filed by counsel for the appellees, a majority of the court has voted to grant reconsideration en banc." (Emphasis supplied)

The majority opinion of the Circuit Court on the class action determination, which was concurred in by Judge Hays, referred to the fact that Judge Griesa found that there was present the requisite numerousness and predominance of common questions of law and fact. It also indicated that the District Judge was in the best position to make a determination of manageability and if unmanageability should develop or facts should arise which indicate that class treatment is inappropriate, the District Judge can reassess the class action designation.

We think it particularly appropriate that the class action determination be reviewed since the case has been transferred from Judge Griesa, who was familiar with the facts, and assigned to Judge Bonsal, who is not more familiar with this case than is this Court. In these circumstances, this Court can supply needed guidance without intruding on the presumed greater knowledge of the District Court.

For the reason stated in our Main Brief, this action should not be permitted to be maintained as a class action.

CONCLUSION

Under the standards established by FRCP Rule 23(b)(3), this action is not authorized to be maintained as a class action. If, nevertheless, this action is permitted to proceed as a class action, the plaintiffs should be required to pay the costs of identifying the members of the class to whom notice is sent pursuant to FRCP Rule 23(c)(2). The identification of class members is an inherent part of the notice procedure under Rule 23(c)(2) and the cost of such identification must be borne by the plaintiffs as required by the decisions of this Court in Eisen III and of the United States Supreme Court in Eisen IV.

Accordingly, the order of the District Court which is appealed from should be vacated and set aside and the District Court should be directed to enter an order denying plaintiffs' motion dated March 30, 1973 and dismissing the action as a class action; or, in the alternative, if this Court determines that the action is properly maintainable as a class action, so much of the order appealed from as concerns the cost of identifying class members should be vacated and set aside and the District Court should be directed to enter an order requiring

plaintiffs to bear the cost of such identification as part of the costs of notice, pursuant to FRCP Rule 23(c)(2).

Respectfully submitted,

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